Supreme Court, U.S.
FILED

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No._____

IN THE
Supreme Court of the United States

RANDEL T. READ,
Petitioner,
v.
NEW YORK STATE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITON FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Does the deliberate untimely disclosure to defendant of exculpatory, impeachment evidence, where there is a sole prosecution witness, which adversely affects defendant's trial preparation, violate defendant's due process rights?

2. Does the prosecution's knowing use of false evidence presented by its sole prosecution witness to obtain a conviction of a defendant violate defendant's due process rights?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). Petitioner's Writ of Habeas Corpus was denied by the U.S. Court of Appeals for the Second Circuit on October 21, 1999, and this petition is timely filed within 90 days thereafter. No petition for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

"No person shall...be deprived of life, liberty or property, without due process of law..."

Fourteenth Amendment to the Constitution of the United States:

"...nor shall any State deprive any person of life, liberty or property, without due process of law..."

STATEMENT OF THE CASE

Randel Read was convicted of 3rd Degree robbery in violation of NY Penal Code Sec. 160.05 on November 17, 1994 by jury trial.

In this habeas corpus petition, Randel Read was deprived of his Due Process rights and right to a fair trial under the 5th, 6th and 14th Amendments to the U.S. Constitution.

First, the prosecution failed to disclose the name, address and telephone number of an eyewitness contained on a 911 police blotter for five months, despite direct inquiry and Brady requests by Mr. Read's defense team. In fact, the prosecution allowed their only witness, Mr. Roussos to testify seven different times that there were no eyewitnesses to the alleged offense in the diner that night, while all the time having in their possession the name, address and telephone number of an eyewitness on the 911 police blotter.

These facts compounded by the jury's questions on the issue of force and their request for the re-reading of Mr. Roussos' trial testimony as well as grand jury testimony for comparison. exemplify the fact that the jury noted the inconsistencies and had serious doubts concerning the veracity, accuracy, reliability and memory of Mr. Roussos, but had nothing else to consider.

By prohibiting the introduction of this evidence, the trial court, the NY Appellate Courts, the Federal District Court and the U.S. Court of Appeals for the Second Circuit completely ignored the legal relevance and probative value of the testimony of the eyewitnesses whose first hand information would have substantially aided the trier of fact, the jury, in their search for the truth. It is obvious to any reasonable person that these witnesses should have been permitted to testify on Mr. Read's behalf.

A. Statement of Material Facts

The alleged crime took place in a diner in which Mr. Read was accused of taking money from a cash register drawer. Mr. Read approached the register, requested change for a $100.00 bill, and when the clerk opened the cash drawer, Mr. Read removed bills from the register and exited.

The cashier, and the prosecution's only witness, Mr. Roussos, gave multiple conflicting versions of the incident in question, i.e. to the investigating officer to whom he never mentioned any force whatsoever being used, to the grand jury (Grand Jury Minutes p. 12) and seven different versions during the trial itself. In addition, Mr. Roussos stated that there was no one sitting in any booths in the diner (Trial Transcript, pp. 51, 72) and more specifically no one sitting in a booth directly across from the cash register. (Trial Transcript, pp. 51,

72) Yet, in every one of Mr. Roussos' versions of the incident, he consistently stated that he believed he was holding Mr. Read by the head or hair while Mr. Read had both hands in the cash register taking out bills.

To the Grand Jury, Mr. Roussos testified that Mr. Read asked for change for a $100.00 bill. Mr. Roussos then indicated that he went from the counter to the cash register, that Mr. Read pushed him back and grabbed the cash register and that Mr. Roussos grabbed him back and held him for five minutes. (Grand Jury Minutes, p. 12)

At trial, Mr. Roussos' version #2 testimony was that Mr. Read asked for change for $100.00, that Mr.Roussos grabbed Mr. Read from the hair and held him for a couple of seconds and called for help and that while Mr. Roussos had Mr. Read by the hair, Mr. Read grabbed the money from the register. (Trial Transcript, p.36)

At trial, Mr. Roussos' version #3 was that Mr. Read asked him for change for $100.00, that as soon as he opened the cash register Mr. Read pushed him and at the same time Mr. Roussos grabbed Mr. Read by the hair and that Mr. Read put his hands inside the cash register and grabbed the money. (Trial Transcript, p.59)

At trial, Mr. Roussos version #4 testimony when asked if Mr. Read pushed him he replied, "No". (Trial Transcript, p.80)

To the Town of Poughkeepsie Police, Mr. Roussos version #5 statement was that when he opened the cash register drawer, Mr. Read reached over the counter and pushed him in the chest with his arm at which point Mr. Roussos grabbed him by the head and tried to push him away. He further stated that while they were in this struggle, Mr. Read grabbed some cash with the other hand. (Trial Transcript, pp.81-82)

In Mr. Roussos' trial testimony version #6 he testified that he opened the register and Mr. Read pushed him at the same time Mr. Roussos grabbed Mr. Read by the hands. He further testifed that the cash register was open and that Mr. Read's hands were inside the cash register and Mr. Roussos pulled Mr. Read out. Mr. Roussos added that he could not hold Mr. Read, Mr. Read went and that he pulled Mr. Read all the way over the counter. (Trial Transcript, p. 83)

In Mr. Roussos' version #7 he testified that he pulled Mr. Read up over the counter but Mr. Read's hands were in the cash because it was open like a machine. (Trial Transcript, p.84)

At trial, Officer Jicha testified that when he first interviewed him, Mr. Roussos never said anything about Mr. Read using any force to take the money from him. (Trial Transcript, pp.109-110)

At trial, Officer Jicha stated that Mr. Read told him that he grabbed the money and fled. (Trial Transcript, p.111)

At trial, Detective Rollison testified that Mr. Read took money out of the cash register and not out of complainant's hands as improperly recorded in Detective Rollision's report. (Trial Transcript, p.132, l. 20-25; p.133; and p.134, l. 1-16)

At the conclusion of summations, but prior to the charging of the jury, the defense discovered two eyewitnesses, Marie Grant and her son Darin Grant, who had been seated in the booth of the diner directly across from the cash register. Both provided statements that at no time did they see Mr. Randel Read use any force. (Exhibits, Grants' Affidavits) Mr. Read's motion to re-open the case in order to present the testimony of these witnesses was denied. (Trial Transcript, p.230)

Specifically, on the last day of the trial at approximately 9:00 A.M. Defense Counsel Levine approached the Court and made two motions to re-open the case prior to the charging of the jury. (Trial Transcript, p.223, l. 24-25; and p.224, l. 1-7)

At approximately 8:40 A.M. on the last day of trial, Mr. Ed Weir, investigator for the defense, spoke to a witness, Marie Grant. Ms. Grant indicated that she was sitting in a booth in the Acropolis Diner at the time of the alleged crime, which is in direct contradiction to the testimony given by the State's only prosecution witness, Mr. Roussos. Ms. Grant told the investigator that she did not see the Defendant, Mr. Randel Read, push or use any force against Mr. Roussos during the incident in question. Ms. Grant indicated that she saw Mr. Read's left hand in the cash register and his right hand either in the register or attempting to get in such that he was almost hugging the cash register. (Trial Transcript, p.225, l. 8-19) This information was presented to the Court at 9:00 A.M. before the jury was charged. The trial judge denied the defense's request to present these defense witnesses (Trial Transcript, p. 229) which was later memorialized on the record. (Trial Transcript, p. 229)

A critical error in the facts recited in the District Court Opinion exists where Judge Brieant states that the witness, Marie Grant, "saw part of the robbery" (Memorandum & Order, p.2) and "she informed him that although she did not see the entire incident" (Memorandum & Order, p.4) **Nowhere in any part of the record is there evidence that the Grants stated that they saw only part of the alleged robbery**. This is a conclusion drawn by the District Court Judge which has no basis in fact. Further, the

trial judge made the assumption that Marie Grant did not see the incident from the onset merely because there exists no specific statement addressing that question. (Trial Transcript, p.226) **Nowhere in Marie Grant's statement or that of her son, Darin Grant (Grants Affidavits) and nowhere in the investigator's statement (Trial Transcript, p.225) does she or her son indicate that they did not see the entire incident in the diner involving Mr. Read**. Lastly, nowhere in the defense attorney's rendition of what information the investigator obtained is there any evidence that Marie Grant or her son Darin ever stated that they did not see the entire incident. (Trial Transcript, pp.225-226)

A second critical error made in the factual statement by District Court Judge Brieant exists where Judge Brieant decided that "the noise almost certainly resulted from Petitioner pushing Mr. Roussos to gain access to the register drawer" (Memorandum & Order, p.9) despite the fact that the only statement made by the Grants was their description of hearing "a loud noise which sounded like a bang". Judge Brieant has made a factual determination, which is the sole province of the jury. The United States Court of Appeals for the Second Circuit affirmed this decision.

B. Statement on Preservation Below of Federal Questions

The federal questions presented by the Petitioner have been the central focus of this dispute between the parties and the principal grounds of the decision below. Both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit rejected Petitioner's arguments that the prosecution's failure to turn over material exculpatory evidence violates the (1) Due Process Clause of the Fifth Amendment; and the (2) Due Process Clause of the Fourteenth Amendment and that the prosecution's knowing use of false testimony violates the (1) Due Process Clause of the Fifth Amendment; and the (2) Due Process Clause of the Fourteenth Amendment. Both lower courts rejected Petitioner's arguments.

REASONS FOR GRANTING THE WRIT

The central issue in this case is one of great importance: whether the Brady rule exempts the prosecution from providing the defense with exculpatory material in its possession when the prosecution does not intend to call the witness(es).

This Court has consistently ruled that material, exculpatory evidence must be provided to the defense in a timely manner. The Second Circuit, by contrast, reached a decision in square conflict with these cases.

The Petitioner seeks review by this Court of the Second Circuit's decision which ruled that the prosecution need not disclose Brady material, i.e., the name, address and telephone number of an eyewitness which it does not intend to call. The court below misapplied the Brady rule deeming the prosecution's decision as to whether or not to call a witness determinative of whether or not the information must be disclosed. The decision below misapplies the Brady rule and directly conflicts with decisions by this Court requiring material, exculpatory evidence to be turned over to the defense.

The Second Circuit's decision completely ignored the Petitioner's argument that the prosecution's knowing use of false evidence to obtain a conviction

violated his due process rights. The decision below conflicts with this Court's numerous decisions condemning the knowing use of perjured testimony and false evidence.

This Petition presents a direct conflict between the Second Circuit and this Court. The Petition also presents important and substantial issues which necessitate review. This Court should grant review.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

A. The Decision Below Misapplies the Concept of the Prosecution's Duty to Provide Brady Material to the Defendant and Thus Conflicts with This Court's Decisions.

Under the rule of Brady v. Maryland, 83 S. Ct. 1194 (1963), the suppression by prosecutors of evidence favorable to an accused, upon request, violates due process, where the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. Brady has been further expanded upon in that the duty to disclose such evidence is applicable even though there has been no request by the accused. United States v. Agurs, 427 U.S. 97, 107 (1976); that the duty encompasses impeachment evidence as well as exculpatory evidence United States v. Bagley, 473 U.S. 667, 676 (1985) and that such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. at 682; see also Kyles v. Whitley, 514 U.S. 419, 433-434 (1995). The rule encompasses evidence known only to police investigators and not to the prosecution, so in order to comply with Brady the "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police". Kyles at 437.

This Court recently stated that there are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching ; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Strickler v. Greene, 527 U.S. ____ (1999).

The Second Circuit's opinion completely ignored the Brady violation in this case. Instead of following the three prong test of Strickler, the Second Circuit has cited U.S. v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990), indicating that the prosecution need not supply the name address and telephone number of witnesses it does not intend to call.

Contrary to the Second Circuit opinion, the prosecutorial duty to turn over exculpatory, material evidence does not turn on the decision of the prosecution as to whether or not they choose to call the witness(es).

B. The Decision Below Ignores This Court's Condemnation of the Knowing Use of Perjured Testimony and Thus Conflicts with This Court's Decisions.

The Second Circuit's opinion held that the government is not required under Brady to turn over addresses and telephone numbers of witnesses it

does not intend to call. The court completely ignored evidence presented and not contested, that the prosecution withheld witness information for five months and allowed its sole prosecution witness to testify falsely that there were no other witnesses to the incident while all the time having in their possession the name, address and telephone number of an eyewitness. The Second Circuit further completely ignored the impeachment value of the eyewitness, purportedly, again, on the only basis given by that circuit for turning over the witness information: if the government intends to call the witness. The Second Circuit, in addition, dismissed the role of the jury in weighing the credibility of witnesses and instead made its own determination from the witness' affadavit as to the petitioner's culpability.

This Court, however, has specifically rejected this conduct by the government in Napue v. Illinois, 360 U.S. 264, 269 (1959) by stating that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942), and that the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. This Court further stated in Napue, Id. that "the principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered

liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness". This Court continued that "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness testifying falsely that a defendant's life or liberty may depend". Napue, Id.

Conclusion

For all of the above reasons, this Court should grant certiorari.

Respectfully submitted,

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Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of October one thousand nine hundred and ninety-nine.

Present: James L. Oakes,
Joseph M. McLaughin,
Robert D. Sack, Circuit Judges.

United States Court of Appeals
Second Circuit
Karen Greve Milton, Acting Clerk
Filed October 21, 1999

Appendix A

No. 98-2799

RANDEL T. READ,
Petitioner-Appellant,

v.

NEW YORK STATE,
Respondent-Appellee

Read v. New York State
Docket No. 98-2799

APPEARING FOR THE
APPELLANT: Cynthia D. Fox,
21 North Nabby Rd., Danbury, CT 06811

APPEARING FOR THE APPELLEE:
Bridget R. Steller, Assistant District Attorney, William V. Grady, Dutchess County District Attorney, Kirsten A. Rappleyea, Assistant District Attorney, 236 Main St., Poughkeepsie, NY 12601

Appeal from the United States District Court for the Southern District of New York (Brieant, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED ADJUDGED AND DECREED, that the judgment of said District Court be and it hereby is affirmed.

Petitioner, Randel Read, presently on parole from a conviction of third-degree robbery after a jury trial in New York state court, appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. Sec. 2254. Read argues that the trial court's denial of his motion to reopen his case in order to call a witness, for whom the prosecution had failed to disclose an address and phone number until the last day of trial, violated his right to due process. We disagree.

We review a district court's ruling on a petition for a writ of habeas corpus de novo. See English v. Artuz, 164 F.3d 105, 108 (2d Cir. 1998). Read must prove by a preponderance of the evidence that his constitutional rights were violated. See id. Defense counsel first learned from the Town of Poughkeepsie Police Department a week before trial that a Marie Grant had witnessed the crime. The investigator for the defense attempted to locate Marie Grant, to no avail. On the morning of the first day of trial, the prosecutor turned over to defense counsel a copy of the police blotter that listed Marie Grant's address and phone number. The two-day trial commenced, during which the investigator continued his attempts to contact Marie Grant.

On the last day of trial, the trial court gave the parties the option of waiting until the next day to present closing arguments. Instead of indicating to the court that he was actively looking for Marie Grant, who might be able to provide favorable and material evidence to the defense, defense counsel chose to proceed with summations that day. Not until the next day, after summations but before the jury was charged, did defense counsel move the court to reopen the case in order to present Marie Grant's testimony to the jury. The court denied his motion.

Under Brady v. Maryland, 373 U.S. 83, 87 (1963), the prosecution has an affirmative duty to disclose without delay evidence in its possession that is "material to either guilt or punishment." Here, defense counsel knew of Marie Grant's identity a week before trial. Read has not pointed to any authority for the proposition that the government is required under Brady to turn over the addresses and telephone numbers of witnesses it does not intend to call. The law of this circuit is to the contrary. Cf. United States v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990) (holding that district court did not err when it did not compel disclosure of addresses and phone numbers of government witnesses). Furthermore, defense counsel was dilatory in his attempts to obtain more information about Marie Grant. There is no evidence that defense counsel attempted to

subpoena the Poughkeepsie Police Department or obtain a court order to acquire the information from the government. Read cannot now convert his counsel's lack of diligence in locating Marie Grant before trial into a Brady violation by the government.

Moreover, evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 427 (1985). Even if this court were to disregard the evidence submitted at trial entirely and consider only Marie Grant's observation of the crime, her affidavit submitted in support of Read's post-verdict motion to reopen the case indicates that she observed petitioner "pull away" from the robbery victim's grasp of his sleeve and run outside. In and of itself, the act of pulling away can represent the force necessary to sustain petitioner's third degree robbery conviction. See People v. Safon, 166 A.D. 2d 892, 560 N.Y.S. 2d 552 (4th Dept. 1990); see also People v. Ross, 180 A.D. 2d 698, 579 N.Y.S. 2d 713 (2d Dept. 1992). Thus, there is no reasonable probability that Grant's testimony would have changed the verdict. The district court, therefore, did not err in concluding that Read does not qualify for habeas relief under Section 2554.

For the Court, Karen Greve Milton, Acting Clerk
By: Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RANDEL R. READ,

Petitioner,

-against-

NEW YORK STATE,

Respondent.

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MEMORANDUM & ORDER
98 Civ. 0578 (CLB)

Brieant, J.

By pro se petition filed January 28, 1998, petitioner Randel Read who is currently on parole, moves pursuant to 28 U.S.C. Sec. 2254, for a writ of habeas corpus. Petitioner seeks nullification of his conviction in the County Court of the County of Dutchess, State of New York (Dolan, J.), for robbery in the third degree in violation of Section 160.05 of the New York Penal Law ("NYPL"). For the reasons set forth below, the petition is denied with leave to appeal.

Background

Before reaching the substantive arguments advanced by Petitioner, we review the facts underlying his conviction. At trial, the complainant George Roussos testified that at approximately 6:45 a.m. on June 4, 1994, Petitioner entered the Acropolis Diner on Main Street in the City of Poughkeepsie, and requested change for a hundred dollar bill. According to Mr. Roussos, when he opened the cash register drawer to comply with this request, Petitioner pushed him away, and grabbed the currency within the drawer. In response, Mr. Roussos claims to have grabbed Petitioner's hair in an attempt to prevent the theft. According to Mr. Roussos, Petitioner again pushed him in an effort to get away.

Petitioner does not dispute that he stole the money from the cash register drawer. He insists, however, that he never made any contact whatsoever with Mr. Roussos during the course of the theft.

After grabbing the money from the drawer, Petitioner fled the diner, with Mr. Roussos in hot pursuit. He was apprehended shortly thereafter by Mr. Roussos. Meanwhile, Ms. Marie Grant, who had been eating in the Diner with her son Darin, and who saw part of the robbery, described what she had seen in a 911 call to the police. The record of this call--the so-called "police blotter"- lists Ms. Grant's

name, address and phone number, and describes her account of the incident as follows:

REPORT FILE 8 STRONG ARM JUST OCCURRED AT ACROPOLIS DINER. 849 MAIN STREET. SUSPECT DESC AS YOUNG W/M PURPLE SWEATSHIRT RED AND WHITE BELT. COMPLAINANT DID NOT SEE FURTHER AND THE VICTIM IS CHASING SUSPECT AT THIS TIME.

See Pet. Exh: NY Ct. of Appeals application and Supplement.

Shortly after the 911 call was made, Poughkeepsie police officer Todd Jicha responded to the scene, and arrived at the Diner to find Mr. Roussos standing beside Petitioner in the parking lot. Mr. Roussos informed Officer Jicha that Petitioner had returned the money stolen from the register. Officer Jicha then arrested Petitioner for the theft of the money.

After complaining of what were apparently drug induced heart symptoms, Petitioner was taken to a nearby hospital. Upon examination and release, he was transported to the police station. There, after having been read his Miranda rights, Petitioner described the events leading up to the evening of drug use which had preceded it.

Petitioner insists, and the State apparently does not dispute, that at no time during his confession did he admit or acknowledge using force against Mr. Roussos during the commission of the crime.

The major issue presented by this petition arises out of the pre-trial proceedings in this case. It is apparently undisputed that in response to Petitioner's initial request for the disclosure of Brady material, the prosecution did not turn over the police blotter report containing the name, address and phone number of Ms. Grant. Nor, according to Petitioner, did the state turn over any material which in any way indicated that there was even an eye witness to the robbery, despite their undisputed awareness of Ms. Grant's observation of it.

According to Petitioner, the defense was first made aware of Ms. Grant's name in the week prior to trial by Mr. Weir, a defense investigator, who had made various inquires of the Poughkeepside Police. Petitioner asserts that although Mr. Weir was given Ms. Grant's name, the police told him that they did not have her phone number or address despite the fact that such information was listed on the same page of the same blotter containing her name. Nor, according to Petitioner, did the police disclose to Mr. Weir that Ms. Grant's address was in Ulster County rather than Dutchess County. Without this information, Mr. Weir contacted every Grant in the Dutchess County phone book. Not surprisingly, he

was unable to locate the Marie Grant who had witnessed the incident at the Acropolis.

On November 16, 1994--the morning of the first day of trial--the state for the first time provided defense counsel with a copy of the blotter which contained Ms. Grant's information. Mr. Weir then made numerous unsuccessful attempts to contact Ms. Grant by telephone. He continued his efforts late into the evening, leaving numerous messages on her answering machine. Meanwhile, the trial was progressing, with both the prosecution and the defense delivering their summations that afternoon.

At 8:20 a.m. on November 17, 1994--the second and final day of trial--Mr. Weir reached Ms. Grant. Essentially, she informed him that although she did not see the entire incident, she did see Petitioner grab the money from the cash register without using any force against Mr. Roussos. Defense counsel moved to reopen the case to allow the jury to hear Ms. Grant's testimony. Apparently this application was made off the record. The trial court refused, and instead proceeded to instruct the jury on the elements of the crime charged.

After charging the jury, the trial court allowed defense counsel to memorialize his request to reopen the case on the record. On the prosecution's objection, the court again refused to reopen the case, reasoning that defense counsel had more than ample time to prepare the case, and allowing Ms.

Grant to testify after summations and after both sides had rested would unduly emphasize her testimony. The Court also pointed out to defense counsel that: "You told me that you wished to sum up yesterday. You did not, at that time, mention that there was any witness or possible witness who had material evidence in this case. Your application is denied." See Trans. 230-232.

Later that day, the jury returned a verdict of guilty on the charge of third degree robbery, a class D felony, in violation of NYPL 160.05 which provides that "[a] person is guilty of robbery in the third degree when he forcibly steals property." See McKinney's NYPL 160.05. Under the statute, Respondent argues, and the Court agrees, that "the real issue for the jury to decide in this case was whether there had been a forcible taking." See Resp. Mem. at 8 (emphasis added). Absent the use of force, petitioner's theft of the cash alone would have constituted a petit larceny, a class A misdemeanor. See McKinney's NYPL 155.25 and see People v. Nixon, 548 N.Y.S. 2d 194, 194 (1st Dep't) 1990), appeal dismissed, 560 N.Y.S. 2d 984 (N.Y. 1990) ("Given the failure of the People to adduce evidence sufficient to establish that force was used by the defendant in such a way as to transform his larceny into a robbery, we reduce his conviction to one for the lesser included offense of petit larceny.").

After Petitioner's various applications for relief in the state court system were denied, this petition followed.

Discussion

Petitioner makes essentially three claims for habeas relief. First, he argues tht the prosecution failed to provide exculpatory material to the defendant in violation of Brady v. Maryland, 373 U.S. 83 (1963). Second, he asserts that he was sentenced improperly under New York law. Finally, he claims that the trial court committed constitutional error in refusing to instruct the jury on the specific intent necessary for a third degree robbery conviction.

A. Brady Claim

Due Process requires prosecutors to disclose material evidence favorable to an accused. Brady 373 U.S. at 87. The duty to disclose encompasses not only exculpatory evidence, but also evidence that may be used to impeach a prosecution witness. Giglio v. United States, 405 U.S. 150, 154 (1972).

As a threshold matter, we address the state's contention that Petitioner's defense counsel were dilatory in investigating the origins of the 911 call. It is true tht there can be no Brady violation where the accused or his counsel knows before trial about allegedly exculpatory information and fails to act

upon it. See United States v. Morales, 916 F. Supp. 336, 341 (S.D. N.Y. 1996). It is also true that courts usually engage in a fact specific inquiry to determine whether "disclosure was so late as to violate [a defendant's] Due Process rights." James v. Kelly, 648 F. Supp. 397, 404 (E.D. N.Y. 1986).

The Court believes, however, that such an inquiry is unnecessary here. In light of Petitioner's apparently uncontested assertions that the state deliberately omitted to disclose Ms. Grant's address and phone number, and allegedly did not even disclose its awareness of her existence in a timely manner, the Court will begin its analysis by assuming without deciding that disclosure in this case was untimely. See United State ex rel. Lucas v. Regan, 503 F.2d 1, 1 n.1 (2d Cir. 1974), cert. denied, 420 U.S. 939 (1975) (normally Brady material must be provided to the defendant as it becomes known to the prosecution.)

What remains at issue, however, is whether Ms. Grant's phone number and address actually represent exculpatory material. It is well understood that prosecutors have an affirmative duty to volunteer evidence that arguably falls within the scope of Brady, and that they are presumed to have knowledge of the contents of their fils. United States v. Agurs, 427 U.S. 97, 110 (1976). Upon defense counsel's motion to re-open the case, the trial prosecutor objected on the grounds that Ms.

Grant's testimony could not possibly rise to the level of Brady material. See Trans. at 227. It is obvious to the Court that allowing Ms. Grant to testify would have contributed to the search for truth, and ideally the case should have been reopened to allow her to do so.

Yet to establish a Brady violation, not only must Petitioner show that the state possessed favorable information and prevented him from using it, he must also show that had this information been dislcosed "there is a reasonable probability that the outcome of the trial would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985). Thus, the "question here is one of 'materiality'." Paradise v. CCI Warden, 136 F.3d 331, 338 (2d Cir. 1998) (quoting Giglio, 405 U.S. at 154).

Petitioner was convicted of third degree robbery in violation of NYPL 160.05 which provides that "[a] person is guilty of robbery in the third degree when he forcibly steals property." As noted above, under that statute, the real issue for the jury to decide in this case was whether the theft of the cash was effected forcibly. On that issue, Ms. Grant's affidavit, as submitted by petitioner, states as follows:

On June 4, 1994, at about 6:45 a.m., myself and my son Darin Grant, were in the Acropolis Diner

located at 829 Main Street in the Town of Poughkeepsie, New York.

I heard a loud noise which sounded like a bang, and then looked up at the cash register counter.

We were sitting in the second booth, which is located directly across from the cash register.

When I looked up, I saw a man standing near the cash register with his left hand in the register. The man from the diner had him by the sleeve. The man pulled away from the cashier and ran out of the door. A lady from the diner then called the police and I got on the phone to describe what I had seen. I wish to state that at no time did I see the first man push the cashier or use any force.

(Emphsis added). Darin Grant, Marie Grant's son, has also submitted an affidavit which essentially reiterates his mother's description of events and states that "at no time did I see the younger man push or use any force against the cashier." See Pet. Exh. Grants Affidavits.

Respondent argues that because the Grants did not see the entire incident, their testimony was not "exculpatory but rather corroborated Mr. Roussos's testimony by placing defendant at the scene of the crime." Resp. Brief at 31. 1 Yet, Petitioner does not dispute his presence at the scene of the crime, or indeed his theft from the cash register drawer.. He disputes only that he used force in committing that theft. In that context, and in light of the fact that Mr. Roussos' uncorroborated testimony was the only evidence which establishes the use of force, the fact that the Grants did not witness any force used against Mr. Roussos is at least arguably exculpatory.

That is not dispositive, however. The Grants describe hearing "a loud noise which sounded like a bang." That noise almost certainly resulted from Petitioner pushing Mr. Roussos to gain access to the cash register drawer. Thus, the noise, together with

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1 Respondent District Attoney has chosen to incorporate by reference the brief to the Appellate Division, Second Department in these proceedings. Acccordingly, unless otherwise indicated, all references to "Resp. Brief" are to that document. The memorandum submitted in opposition to the instant petition is referred to herein as "Resp. Mem."

Mr. Roussos' actual testimony to that effect, establish for this Court beyond a reasonable doubt that Petitioner "pushed" Mr. Roussos in effecting the robbery. In sum, there is no "reasonable probability that the outcome of the trial would have been different" with the Grants testimony, Petitioner's conviction remains valid. See Bagley, 473 U.S. at 682.

Even without the "push" of Mr. Roussos, Petitioner's third degree robbery conviction is sustainable on an independent basis. Under New York law, "[t]o sustain a conviction of robbery in the third degree...it must be shown...that the defendant used or threatened "the immediate use of physical force upon another person for the purpose of: 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking."Nixon, 548 N.Y.S. 2d at 194 (citing People v. Chessman, 429 N.Y.S. 2d 224, 229 (2d Dep't. 1980), appeal dismissed by, 446 N.Y.S. 248 (N.Y. 1981). Disregarding Mr. Roussos' testimony entirely, and applying these principles to the Grants' observation of events exclusively, Petitioner was seen by the Grants to "pull away" from Mr. Roussos' grasp of his sleeve. In of itself, the act of "pulling away" represents the force necessary sustain Petitioner's third degree robbery conviction, in that it was use of force for the purpose of retaining property after a taking. Nixon, 548 N.Y.S. 2d at 194; Chessman, 429 N.Y.S. 2d at 229. Petitioner's conviction is valid on that

independent basis.

Notwithstanding our conclusion in this regard, the Court recognizes that this case poses some troubling issues, which are entitled to consideration on appeal. Accordingly, and in the interests of Justice, this Court hereby issues to Petitioner a Certificate of Appealability as contemplated by Rule 22 F.R.App. P.

Here ends the decision as to the issues pertinent to the writ of certiorari. The Sentencing Claim and the Jury Instruction Claim are not in issue. The Conclusion follows.

Conclusion

For the reasons set for the above, the petition is denied, with a certificate of Appealability of probable cause hereby granted upon this Court's finding that such an appeal would not be frivolous.

SO ORDERED
Dated: White Plains, New York
June 11, 1998

CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.